Tropiland Sdn Bhd v Public Prosecutor

HIGH COURT (PENANG) — CRIMINAL APPEAL NO 41-322-91
VINCENT NG JC
10 MARCH 1993

Criminal Law *— Erection of structure adjoining a building — Street, Drainage and Building Act 1974 ss 70(1) & 79(1)*

Criminal Procedure *— Appeal — Charge — Whether charge was bad in law — Whether appellant should be charged under a different section — Street, Drainage and Building Act 1974 ss 70(1) & 79(1)*

The appellant was charged and convicted under s 70(1) of the Street, Drainage and Building Act 1974 ('the Act') for erecting two structures in a shopping complex. The appellant's sole ground of appeal was that the learned trial magistrate ought to have held that the charge against the petitioner was bad in law and should have been dismissed. The trial magistrate ought to have held that the proper section for the appellant to be charged for erecting the said counters was s 79 of the Act. On appeal, the court considered that the question for judicial determination would be whether s 70 of the Act was intended by the legislature to apply only to cases which involved the construction of a whole or substantial portion of a building, as opposed to cases which involved only the erection of a structure in or adjoining a building.

Held, allowing the appeal and altering the conviction under s 70(1) to one under s 79(1):

(1) As the offence committed by the appellant in the instant case involved the erection of two permanent structures in an existing building, the offence clearly came within the ambit of s 79(1) and not s 70(1) of the Act. Therefore, a person who carries out works or things specified in s 70(16)(b)(ii), (f), (g) or (h) or works specified in s 79, does not have to submit plans and specifications under s 70(2) (though he would have to submit plans under s 79) and the offence committed by a person for not obtaining prior written permission of the local authority in respect of such works would thus fall out of the purview of s 70(1) but within the purview of s 79 of the Act.

(2) A magistrate is not empowered to make any demolition order a la s 70(16) of the Act in respect of an offence under s 79(1). It is perhaps for this reason that local authorities invariably frame their charge against an offender under s 70(1) of the Act, even when the facts disclose an offence under s 79(1) of the Act. Such framing of a charge based on expediency is proscribed under every statute and law and is clearly unjust.

[Bahasa Malaysia summary

Pemohon telah didakwa dan disabit di bawah s 70(1) Akta Jalan, Parit dan Bangunan 1974 ('Akta itu') kerana membina dua struktur di dalam sebuah kompleks membeli-belah. Hanya satu sahaja alasan rayuan yang dikemukakan oleh pemohon iaitu bahawa majistret yang arif sepatutnya memutuskan bahawa dakwaan terhadap pemohon adalah salah dari segi undang-undang dan sepatutnya diketepikan. Majistret perbicaraan sepatutnya memutuskan bahawa seksyen yang sesuai digunakan untuk mendakwa pemohon kerana membina kaunter tersebut adalah s 79 Akta itu.

Diputuskan, membenarkan rayuan itu dan menggantikan sabitan di bawah s 70(1) dengan satu di bawah s 79(1):

(1) Oleh kerana kesalahan yang dilakukan oleh pemohon di dalam kes ini melibatkan pembinaan dua struktur yang tetap di dalam sebuah bangunan yang sedia ada, kesalahan itu dengan jelas jatuh di bawah ruang lingkup s 79(1) dan bukan di bawah s 70(1) Akta itu. Oleh itu, seseorang yang menjalankan kerja atau perkara yang dinyatakan di dalam s 70(16)(b)(ii), (f), (g) atau (h) atau kerja yang dinyatakan di dalam s 79, tidak perlu menyerahkan pelan dan spesifikasi di bawah s 70(2) (tetapi beliau perlu menyerahkan pelan di bawah s 79) dan kesalahan yang dilakukan oleh seseorang kerana tidak mendapat kebenaran bertulis terlebih dahulu dari pihak berkuasa tempatan berkaitan dengan kerja tersebut akan jatuh keluar dari skop s 70(1) tetapi berada di dalam skop s 79 Akta itu.

(2) Seseorang majistret tidak diberi kuasa untuk membuat perintah perobohan melalui s 70(16) Akta itu berkaitan dengan suatu kesalahan di bawah s 79(1). Mungkin kerana sebab inilah pihak berkuasa tempatan telah menuduh seseorang pesalah di bawah s 70(1) Akta itu, walaupun fakta-fakta menunjukkan suatu kesalahan di bawah s 79(1) Akta itu. Membuat pertuduhan sedemikan demi suaimanfaat ditegah di bawah kesemua statut dan undang-undang dan jelas tidak adil.]

Legislation referred to

Street, Drainage and Building Act 1974 ss 70(1), (2), (16) & 79(1)

Balwant Singh Purba (*Balwant Singh & Co*) for the appellant.
Wong Teck Meng (Deputy Public Prosecutor) for the respondent.

Vincent Ng JC: This is an appeal from the decision in the Magistrate's Court, Georgetown, Pulau Pinang in respect of the following charge:

That you on 13 October 1987, did erect a building to wit:

(1) A drinks counter measuring approximately 6'x15' within 'lift lobby' area at the ground floor of Komtar Multi-Storey Car Park Complex, Penang.
(2) A counter measuring approximately 6'x21' at the right side in front of the entrance to 'lift lobby' area the ground floor of Komtar Multi-Storey Car Park Complex, Penang

A without the prior written permission of the Majlis Perbandaran Pulau Pinang in contravention of s 70(1) of the Street, Drainage and Building Act 1974 and you have thereby committed an offence punishable under s 70(13)(c) of the said Act.

The appellant was convicted of the said charges and fined RM3,000 and the said two structures in question were ordered to be demolished within
B one year.

The sole ground of appeal by the appellant is that the learned trial magistrate ought to have held that the charge against the petitioner under s 70 of the Street, Drainage and Building Act 1974 ('the Act') was bad in law and should have dismissed and acquitted the petitioner of the same;
C rather the learned trial magistrate ought to have held that the proper section for the defendant to be charged for erecting the said counters is s 79 of the Act.

At the hearing of the appeal, it was conceded by counsel for the appellant that though the charge mentioned the subject matter as two counters, they were in fact two permanent shop-counter structures constructed at the lift
D lobby area of the ground floor of Komtar Multi-Storey Car Park Complex, Penang.

Section 70(1) and (2) of the Act states as follows:

1 No person shall erect *any building* without the prior written permission of the local authority.

E 2 Any person who intends to erect any building shall submit to the local authority such plans and specifications as may be required by any by-law under this Act. (Emphasis added.)

Whereas s 79(1) of the Act states as follows:

F No person shall erect or cause or permit to be erected *in any building* any partition, compartment, gallery, loft, roof, ceiling or other structure without having the prior writing permission of the local authority. (Emphasis added.)

The penalty under s 70(13) of the Act for contravention of s 70(1) of the same is a fine not exceeding RM10,000 and shall also be liable to a further fine of RM250 for every day during which the offence is continued after
G conviction. The penalty under s 79(4) of the Act for contravention of s 79(1) of the same is a fine not exceeding RM500 and shall also be liable to a further fine not exceeding RM100 for every day during which the offence is continued after conviction. It becomes pertinent for this court to determine whether the said two permanent shop-counter structures erected
H at the ground floor of a then existing building known as Komtar Multiple Storey Car Complex, could be considered as erection of two 'buildings' to bring it within the ambit of s 70(1) of the Act or could such erections be considered as mere erections in a building within the purview of s 79(1) of the Act.

I The question for judicial determination would thus be whether s 70 of the Act is intended by the legislature to apply only to cases which involve the construction of a whole or substantial portion of a building, as opposed to cases which involve only the erection of a structure or structures in or adjoining a building.

Section 70(16) of the Act states as follows:

For the purposes of this section and of section 75 a person shall be deemed to erect a building who —

(a) begins work ... in respect of a new building;
(b) adds to or alters any existing building in such a manner as to involve —
    (i) new foundations; or
    (ii) new or partly new or increased super-structure or roof on existing walls or existing foundations;
(c) converts into a dwelling-house ...
(d) converts into more than one dwelling-house ...
(e) converts to other purposes a ... dwelling-house;
(f) departs either before or after the completion of the building in any particular form from any plan or specification approved by the local authority at any time in respect of such building;
(g) infringes the provisions of this Act or any by-laws relating to buildings;
(h) renews or repairs any existing building in such a manner as to involve a renewal, reconstruction or erection of any portion of an outer or party wall to the extent of one storey in height whatever the material of such outer or party wall is;
(i) demolishes and reconstructs ...
(j) constructs an additional storey ...

Provided that, for the purposes of subsection (2) and for the purposes of section 75 a person who executes or does any of the works or things specified in paragraph (b)(ii), (f), (g) or (h) of this subsection shall not be deemed to erect a building.

There seems to be an apparent inconsistency between the first limb and the proviso in the last limb of this section as, contrary to the first limb, it clearly states that for the purposes of ss 70(2) and 75 of the Act, a person who executes or does any of the works or things specified in paras (b)(ii), (f), (g) or (h) above, *shall not be deemed to erect a building.* (Emphasis added.)

Section 70(2) of the Act requires any 'person who intends to erect any building, to submit to the local authority such plans and specifications as, may be required ...'. Section 70(1) forbids a person from erecting any building without prior written permission from the local authority, thus being the offence creating subsection of the Act. Obviously, such written permission essentially entails the submission and approval of plans and specifications required under s 70(2) of the Act. It would logically follow that a person who carries out works or things specified in paras (b)(ii), (f), (g) or (h) of s 70(16) or works specified in s 79, does not have to submit plans and specifications under s 70(2), and the offence committed by a person for not obtaining prior written permission of the local authority in respect of such works would thus fall out of the purview of s 70(1) of the Act. This is so, as he or she 'shall not be deemed to erect a building' in respect of works specified under paras (b)(ii), (f), (g) or (h) aforesaid. However, in respect of any of such specified works to be carried out in or adjoining an existing building, and works other than works specified in s 70(16)(a), (b)(i), (c), (d), (e), (i) and (j) of the Act, the person concerned

would still be required by the Act to submit to the local authority plans and specifications under s 79(1) of the Act — rather than s 70(2) of the Act — in respect of which, the proper penalty for contravention would be as provided under s 79(4) of the Act.

The above interpretation of s 70 read in conjunction with s 79 of the Act would resolve the apparent inconsistency between the first limb and the proviso in the last limb of s 70(16) of the Act, though in my view such inconsistency is only apparent rather than real. In any event, should there be any inconsistencies or conflict between the two aforesaid limbs of the provision in s 70(16), it is settled law such inconsistencies or conflict if any, in a penal provision should be resolved in favour of the defendant.

In determining what works by a person constitutes 'erecting any building' and thus liable to be charged under s 70(1) of the Act, the works specified under s 70(16)(a), (i) and (j), (which works, inter alia, are specifically excluded in the said proviso in the last limb of s 70(16)) could perhaps be of assistance, as it is expressly provided that such works do constitute erecting a building.

Section 70(16)(a), (i) and (j) states as follows:

> For the purposes of this section and of section 75 a person shall be deemed to erect a building who —
>
> (a) begins work on the site thereof for or in respect of a *new building*;
>
> ...
>
> (i) demolishes and reconstructs or adds to a building in such a manner as to involve more than —
>
> (i) half the superficial area of walls and partitions; or
> (ii) half the superficial area of floors (excluding ground floor) or roofs; or
>
> (j) constructs an additional storey or storeys, or renews, reconstructs or erects an outer or party wall of the first, second or third storey counting from the ground, to the extent of one storey in height: (Emphasis added.)

As the offence committed by the appellant in the instant case involved the erection of two permanent structures in an existing building, and not any of the works specified in s 70(16)(a), (b)(i), (c), (d), (e), (i) or (j) of the Act, the offence clearly came within the ambit of s 79(1) and not s 70(1) of the Act.

For the above reasons, I allowed the appeal and altered the learned magistrate's conviction of the appellant under s 70(1) of the Act to a conviction under s 79(1) of the same Act by virtue of the recorded evidence in the appeal record having clearly disclosed an offence committed by the appellant in contravention of s 79(1). The fine of RM3,000 by the learned magistrate is also set aside and substituted with a fine of RM500 against the appellant, with consequential order herein for a refund of RM2,500 to the appellant. The demolition order made by the learned magistrate under s 70(15) of the Act is also vacated.

Counsel for the appellant informed the court that the appellant had, since the decision of the learned magistrate, obtained the necessary approval plans in respect of the two structures and had regularized the breach. It is however worthy to note that a magistrate is not empowered to make any

demolition order a la s 70(15) of the Act in respect of an offence under s 79 of the Act. It is perhaps for this reason that local authorities invariably frame their charge against an offender under s 70(1) of the Act, even when the facts disclose an offence under s 79(1) of the Act. Such framing of a charge based on expediency is proscribed under every statute and law and is clearly unjust.

Order accordingly.

Reported by Jeanne Tan